

**REMARKS**

Reconsideration is requested.

Claims 8 and 12 are pending.

Claim 1 has been canceled, without prejudice, to advance prosecution. Claim 12 was rewritten in independent form in the Amendment filed August 14, 2009, in response to the Examiner's comment spanning pages 3-4 of the Office Action dated May 14, 2009.

In a teleconference with the undersigned on or about November 13, 2009, the Examiner indicated that claims 12 of the Amendment of August 14, 2009 was not in condition for allowance due to an alleged lack of written description support. The Examiner indicated during the teleconference that, among other options, either claim 12 could be canceled, without prejudice, and claim 8 would be allowed to issue or the Examiner could issue a further non-final Office Action providing basis for the further, new, rejection of claim 12. A further non-final Office Action is requested in the event the Examiner finds the above amendments to not place the application in condition for allowance. The undersigned spoke with the Examiner on November 18, 2009 to confirm the applicants intention to file the present Amendment.

Claim 12 has been revised above, without prejudice, based on the disclosure, for example, at page 2, lines 3-5 and page 3, lines 34-38. No new matter has been added. Attached is a copy of Wayne et al "Report of the Ad Hoc Committee on Reconciliation of Approaches to Bacterial Systematics" International Journal of Systematic Bacteriology, Oct. 1987, vol. 37, No. 4, p. 463-464, which demonstrates that the recitation of 70% in

claim 12 is commonly accepted by the scientists and those of ordinary skill in the art.

The attached supports the applicants belief that one of ordinary skill will appreciate that the applicants were in possession of the claimed invention at the time the application was filed.

The attached document is listed on the attached PTO 1449 Form, along with documents cited in the Remarks of the Amendment After Final Rejection filed May 13, 2008. The Examiner is requested to confirm consideration of the cited art pursuant to MPEP § 609.05(c). The Examiner is authorized to charge the undersigned's Deposit Account No. 14-1140 for any fee required for consideration of the cited art. Return of an initialed copy of the attached PTO 1449 Form, pursuant to MPEP § 609, is requested to confirm consideration of the cited art.

The claims are submitted to be in condition for allowance and a Notice to that effect is requested. The Examiner is requested to contact the undersigned, preferably by telephone, in the event anything further is required in this regard.

Respectfully submitted,

**NIXON & VANDERHYE P.C.**

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